(1)

No. 04-53 MAY 8 2004

IN THE SUPREME COURT OF THE UNITED STATES

HARRY BUTRY, JR.,

Petitioner

vs.

SUPERINTENDANT SCI-COAL TOWNSHIP, Superintendant at SCI-Coal Township; LUZERNE COUNTY, District Attorney, ATTORNEY GENERAL,

Respondents

On Petition for Writ of Certiorari To The U. S. Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

Michael C. Kostelaba, Esquire
Counsel of Record
P.O. Box 1321
Wilkes-Barre, Pa. 18703
(570)-823-1778

Questions Presented for Review

1. Whether the Third Circuit's decision, denying Mr. Butry a certificate of appealability, conflicts with the standards established by the United States Supreme Court in Miller-El vs. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed. 931 (2003). More particularly, (a)(1) whether there is a substantial argument that trial counsel failed to pursue a reasonably arguable defense by failing to have a diminished capacity jury instruction requested and given, **or**, (2) whether reasonable jurists could disagree over this issue, and (b)(1) whether Mr. Butry has made a substantial showing that there was an arguable basis for the jury to consider a challenge to the government's premediation argument, **or**, (2) whether reasonable jurists could disagree over this issue.

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Opinions Below

There was no opinion by the Pennsylvania trial court on these issues. The opinions of the Pennsylvania appellate courts are attached hereto. (App. 28a-38a)

The opinions of the federal district court were not reported. A copy of said opinions are attached hereto. (App. 5a-27a)

The opinions of Third Circuit were not officially reported. A copy of said opinions are attached hereto. (App. 1a-4a)

Jurisdiction

The original judgement of the Third Circuit was entered on January 13, 2004. On February 9, 2004, the Third Circuit entered its denial of Ms. Butry's Petition for Rehearing.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

Statement of the Case

On August 21, 1997, Mr. Butry shot and killed Tina Marcario.

State Court Proceedings

The sole issue at trial was the degree of Mr. Butry's guilt.

On January 16, 1998, after a trial by jury conducted by the Honorable Hugh F. Mundy of the Luzerne County, Pennsylvania Court of Common Pleas in Wilkes-Barre, Pennsylvania, Mr. Butry was found guilty of first degree murder, 18 Pa.C.S. Section 2502(a).

On March 20, 1998, Mr. Butry was sentenced to life imprisonment without parole. This sentence is a mandatory sentence over which Judge Mundy had no discretion. 18 Pa.C.S. Section 1101(b).

At sentencing, Mr. Butry was represented by his trial counsel.

On March 27, 1998, a motion for post-trial relief was filed by trial counsel. This motion did not raise any of the issues which are the subject of the application for a certificate of appealability. This motion was denied on July 15, 1998.

On August 3, 1998, Mr. Butry filed an appeal to the Pennsylvania Superior Court. Present counsel undertook Mr. Butry's representation for this appeal and for all subsequent proceedings.

The issues, which were raised before the district court and are being raised herein, were first raised in the appeal to the Pennsylvania Superior Court. In accordance with and as required by Pennsylvania law, new counsel has an obligation to raise all claims of ineffective assistance of prior counsel at the first opportunity. Therefore, appellate counsel obtained and expanded the trial court record to

include additional material, which presented a factual basis for Mr. Butry's (a) defense of diminished capacity due to a drugged condition and (b) defense of ready access to other firearms claims.

The remedies requested by Mr. Butry included that his case be remanded to the trial court for additional factual hearings on Mr. Butry's diminished capacity due to a drugged condition and ready access to other firearms claims.

The Pennsylvania appellate courts concluded that there was no need for any additional factual hearings. The Pennsylvania appellate courts concluded, **as a matter of law,** that Mr. Butry would not be entitled to any relief.

On October 15, 1999, the Pennsylvania Superior Court denied Mr. Butry's appeal.

On October 29, 1999, Mr. Butry filed an application requesting reargument or reconsideration with the Pennsylvania Superior Court. This application was denied on December 20, 1999.

On January 18, 1999, Mr. Butry filed an application for allowance of appeal with the Pennsylvania Supreme Court. This application was denied on May 18, 2000.

Federal District Court Proceedings

On May 11, 2001, Mr. Butry filed his habeas corpus petition and a supporting brief with the district court.

On June 11, 2001, the Respondent Luzerne County District Attorney's Office filed a response to Mr. Butry's habeas corpus petition and a brief in support of its response.

On June 25, 2001, Mr. Butry filed a reply brief.

The district court permitted Mr. Butry to obtain certain discovery from the government in accordance with Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts.

The district court permitted the parties to file additional briefs.

The district court denied Mr. Butry's Petition **without** conducting an evidentiary hearing.

Simiarly, the Third Circuit denied Mr. Butry's Petition for a Certificate of Appealability.

Mr. Butry's basis for this application is centered upon two (2) legal theories, (1) a diminished capacity due to a drugged condition theory and (2) a ready access to other firearms theory.

Diminished Capacity

Trial counsel pursued a heat of passion defense.

At trial, Mr. Butry testified that at the time of the shooting, he was "on" prozac and had, also, taken valium.

Trial counsel did not request and did not receive a diminished capacity jury instruction. In particular, trial counsel did not request a jury instruction that a voluntary drugged condition would permit the jury to conclude that Mr. Butry did not have the specific intent to commit first degree murder and, thereby, permit the jury to consider a verdict of third degree murder. See 18 Pa.C.S. Section 308.

Trial counsel did not present any argument to the jury or attempt to develop a diminished capacity defense due to Mr. Butry's drugged condition.

During the district court proceedings, Mr. Butry was permitted to obtain certain discovery from the government. As disclosed to Mr. Butry as a result of this discovery, there is **no** factual basis to conclude that trial counsel had any factual basis for not raising a diminished capacity due to a drugged condition defense. Rather, the sole basis for not pursuing a diminished capacity due to a drugged condition defense is the legal position taken by the district court and by the Pennsylvania appellate courts that a diminished capacity defense, **necessarily and as a matter of law**, conflicts with a heat of passion defense.

The undisputed facts before the district court included trial counsel's reliance upon a written report by a Dr. Robert L. Sadoff. This report supports Mr. Butry's position that at the

time of the offense conduct (a) he was under the influence of prozac and valium and (b) "he was out of control".

Dr. Sadoff's report does not explore a diminished capacity defense due to voluntary drug use.

The **undisputed facts** before the district court were that neither Dr. Sadoff nor trial counsel had considered the viability of a diminished capacity defense due to Mr. Butry's voluntary drug use.

Ready Access to Other Firearms

The government presented evidence at trial that for several days prior to the shooting, Mr. Butry had been frantically trying to procure a firearm with which to kill Tina Marcario. However, contrary to the government's theory of the case, during the period of time during which the government contended

that Mr. Butry was frantically trying to procure a firearm, Mr. Butry had, **in fact**, ready access to several other firearms.

Trial counsel (a) did not investigate the issue of Mr. Butry's ready access to other firearms, (b) presented no witnesses or evidence on this issue, and (c) did not attempt to develop this issue in any manner.

The district court concluded that this issue had, in fact, been adequately raised at trial. The factual basis for this conclusion is that the twenty-second government witness, Steve Fogle, testified during the government's case-in-chief, that Mr. Butry was attempting to convince him (Steve Fogle) to provide Mr. Butry with a gun, but that Steve Fogle refused.

Statement of Reasons Relied Upon for an Allowance of Appeal

In determining whether to grant a certificate of appealability, the applicable standard is whether (a) jurists of reason could disagree with the district court's resolution of a petitioner's constitutional claims **or** (b) jurists could conclude that issues presented are adequate to deserve encouragement to proceed further. Miller-El vs. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed. 931 (2003).

Diminished Capacity Due to a Drugged Condition

The district court concluded that trial counsel was not ineffective for failing to investigate and pursue a defense of diminished capacity due to a drugged condition. More particularly, the district court concluded that,

as a matter of law, diminished capacity is inconsistent with the defense chosen by trial counsel, i.e. a heat of passion defense.

A heat of passion defense is **NOT** inconsistent with a diminished capacity defense. Consider Commonwealth vs. Legg, 551 Pa. 437, 711 A.2d 430 (1985). Accordingly, **as a matter of law**, the district court's decision is simply **wrong**.

Moreover, because trial counsel never even considered the viability of a diminished capacity defense due to a drugged condition, trial counsel did not even undertake any analysis of which defense to pursue. Because trial counsel did not even consider the viability of a diminished capacity due to a drugged condition defense, trial counsel was in no position to determine whether or not to pursue this defense. See Strickland vs. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984); Hill vs. Lockhart, 472 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Consider also Commonwealth vs. Perry, 537 Pa. 383, 644 A.2d 704 (1994).

Ready Access to Other Firearms

A material part of the government's case against Mr. Butry was based on the government's factual position that Mr. Butry was running wild, frantically trying to get a firearm for several days before the offense conduct. This factual position supported the government's conclusion that the shooting had been premeditated.

Therefore, evidence that Mr. Butry had ready access to other firearms during this same time period would have materially undermined the government's theory of the case.

The district court concluded that this issue had, in fact, been adequately raised at trial. The factual basis for this conclusion is that the twenty-second government witness, Steve Fogle, testified during the government's case-in-chief, that Mr. Butry was attempting to convince him (Steve Fogle) to provide Mr. Butry with a gun, but that Steve Fogle refused.

The evidence presented at trial **did not, in any way**, raise the fact that Mr. Butry had ready access to several other firearms. The district court's conclusion is **wholly devoid** of any **factual** basis.

Conclusion

For the foregoing reasons, the Court should grant Mr. Butry's application for a writ of certiorari

Respectfully,

s/Michael C. Kostelaba

Michael C. Kostelaba, Esquire
Counsel of Record

P.O. Box 1321
Wilkes-Barre, Pa. 18703
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(2)

No. 04-53 MAY 8 2004

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vs.

SUPERINTENDANT SCI-COAL TOWNSHIP, Superintendant at SCI-Coal Township; LUZERNE COUNTY, District Attorney, ATTORNEY GENERAL,

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On Petition for Writ of Certiorari To The U. S. Court of Appeals for the Third Circuit

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APPENDIX - VOLUME 1

Michael C. Kostelaba, Esquire
Counsel of Record
P.O. Box 1321
Wilkes-Barre, Pa. 18703
(570)-823-1778

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UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

03-2581

HARRY BUTRY, JR.,

Appellant

v.

SUPERINTENDANT SCI-COAL TOWNSHIP, Superintendant at SCI-Coal Township; LUZERNE COUNTY, District Attorney, ATTORNEY GENERAL,

---

SUR PETITION FOR REBUTTAL

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, FUENTES, SMITH and CHERTOFF, Circuit Judges

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in the regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

s/Samuel A. Alito, Jr.

Circuit Judge

Dated: February 9, 2004

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

03-2581

HARRY BUTRY, JR.,

Appellant

v.

SUPERINTENDANT SCI-COAL TOWNSHIP, Superintendant at SCI-Coal Township; LUZERNE COUNTY, District Attorney, ATTORNEY GEBERAL,

---

ORDER

(Alito, Authorizing Judge, Fuentes and Chertoff, Circuit Judges) denying motion by appellant for certificate of appealability.

With respect to his claim that counsel was ineffective for failing to pursue a diminished capacity defense, Appellant has not shown

that a factual basis existed for such a defense. See Commonwealth v. Wilson, 672 A.2d 293, 297 (Pa.Super. 1996) (stating that a defendant claiming use of intoxicants must be overwhelmed by them to the point of losing control over his faculties). In addition, Butry has not shown a reasonable probability that but for counsel's alleged failure to present evidence of his access to other firearms, the result of the proceeding would have been different. See Strickland v. Washington, 466 U.S. 668, 694 (1984). Appellant has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. Section 2253(c).

filed: January 13, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HARRY BUTRY,	:	CIVIL ACTION
Petitioner	:	No. 3:CV-01-0834
	:	
v.	:	(Judge Munley)
	:	
SUPERINTENDANT,	:	
SCI -COAL	:	
TOWNSHIP, et al.,	:	
Respondent	:	

ORDER

Presently before the court is the Petitioner's "Motion for reconsideration of an application for a certificate of appealability in accordance with 28 U.S.C. [Section] 2243(c)." (Doc. 24). The motion is construed as a motion for reconsideration pursuant to Fed.R.Civ.P. 59(e). For the reasons that follow, the motion will be denied.

A motion for reconsideration is a device of limited utility. It may be used only to seek remediation of manifest errors of law or fact or to present newly discovered precedent or evidence which, if discovered previously, might have affected the court's decision. Harsco Corp. v. Zlotnicki, 779 F.2d 906 (3d Cir. 1985), cert. denied, 476 U.S. 1171 (1986). It has also been held that a motion for reconsideration is appropriate in instances such as where the court has "... misunderstood a party, or has made a decision outside the adversarial issues presented to the court by parties, or has made an error not of reasoning, but of apprehension." See Rohrbach v. AT&T Nassau Metals Corp., 902 F. Supp. 523, 527 (M.D. Pa. 1995), vacated in part on other grounds on reconsideration, 915 F. Supp. 712 (M.D. Pa. 1996) (quoting Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99,

101 (E.D. Va. 1983). "Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly." Continental Casualty Co. v. Diversified Indus., Inc., 884 F. Supp. 937, 943 (E.D. Pa. 1995).

Butry seeks reconsideration of the portion of the order concerning issuance of a certificate of appealability. A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. [Section] 2253 (c)(2). The applicant must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Based upon the fact that the Petitioner failed to make a substantial showing of a denial of a constitutional right, this Court

declined to issue a certificate of appealability following the denial of his request for habeas corpus relief. 28 U.S.C. [Section] 2253(c)(2); See Coady v. Vaughn, 251 F.2d 480 (3d. Cir. 2001). In his motion for reconsideration, Butry fails to demonstrate a change of law, new evidence, or a need to correct clear error of law such that this issue merits reconsideration. Plaintiff merely wants this Court to rethink its earlier decision. Glendon Energy Company v. Borough of Glendon, 836 F.Supp. 1109, 1122 (E.D. Pa. 1993) (a motion for reconsideration is not properly grounded on a request that a court rethink a decision already made). Accordingly, this court finds that Plaintiff has not satisfied the requirements for a successful motion for reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure, and, therefore, Plaintiff's motion is denied.

AND NOW, to wit, this 13 day of June, 2003, it is hereby ORDERED that:

1. The Plaintiff's "Motion for reconsideration of an application for a certificate of appealability in accordance with 28 U.S.C. [Section] 2243(c)" is DENIED:

2. Any appeal taken from this order will be deemed frivolous, without probable cause, and not taken in good faith.

BY THE COURT:

s/Judge James M. Munley

Filed: June 13, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HARRY BUTRY,	:	CIVIL ACTION
Petitioner	:	No. 3:CV-01-0834
	:	
v.	:	(Judge Munley)
	:	
SUPERINTENDANT,	:	
SCI -COAL	:	
TOWNSHIP, et al.,	:	
Respondent	:	

MEMORANDUM AND ORDER

Petitioner, Harry Butry, filed a counseled habeas corpus petition pursuant to 28 U.S.C. [Section] 2254. (Doc. 1). A brief in support of the petition was also filed. (Doc. 2). A show cause order was issued and a response and brief in support of the response were filed on June 11, 2001. (Docs. 7 and 8). A "reply

brief" was then filed on behalf of the Petitioner on June 25, 2001. (Doc. 9). On January 18, 2002, a supplemental brief was filed on behalf of the Petitioner. (Doc. 17). The Respondents then filed a response to the supplemental brief. (Doc. 19). On April 13, 2003, the Respondents were directed to file all state court opinions relating to the Petitioner's direct appeal. On May 1, 2003, the Respondents filed the requested state court opinions. (Doc. 21). The petition is presently ripe for disposition and, for the reasons that will follow, will be denied.

I. Procedural Background

Following a jury trial in the Court of Common Pleas of Luzerne County, the Petitioner was found guilty of first degree murder on January 16, 1998. He was then sentenced to life imprisonment without parole

on March 20, 1998. A motion for post sentence relief followed. The motion was denied. An appeal to the Pennsylvania Superior Court was filed and, on October 15, 1999, the Superior Court of Pennsylvania affirmed the conviction and sentence. A timely Petition for Allowance of Appeal resulted in a May 18, 2000, Order denying the Petition for Allowance of Appeal.

The Petitioner then filed the instant petition for writ of habeas corpus in federal court wherein he presents the following issues for consideration:

Ground One: Trial counsel was ineffective for failing to pursue a diminished capacity defense, and,

Ground Two: Trial counsel was ineffective for failing to investigate and present evidence that, contrary to the government's theory of the case, Mr. Butry had ready access to firearms.

(Doc. 1, pp. 4-5). As the Respondents concede that the Petitioner has exhausted available state court remedies (Doc. 7, p.2 [paragraph] 6), these claims will be considered on the merits.

II. Discussion

A. Standard of Review

The Antiterrorism and Effective Death Penalty Act, enacted on April 24, 1996, revised the standard of review for cases challenging state convictions pursuant to 28 U.S.C. [Section] 2254, *Dickerson v. Vaughn*, 90 F.3d 87, 89 (3rd Cir. 1996) *citing* Antiterrorism and Effective Death Penalty Act, Pub.L. 104-132, Title I, sec. 104, 110 Stat. 1214 (1996)("AEDPA"). Section 2254(d), as amended, states as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court, shall not be granted with respect to any claim that was adjudicated on the merits in

State court proceedings unless the adjudication of the claim -
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. [Section] 2254.

The "contrary to" provision contained in Section (d)(1) is evaluated as follows:

[T]he inquiry must be whether the Supreme Court has established a rule that determines the outcome of the petition. Accordingly, we adopt *O'Brien's* holding that "to obtain relief at this stage, a habeas petitioner must show that the Supreme Court precedent requires an outcome contrary to that reached by the relevant state court." In other words, it is not sufficient for the petitioner to show merely that his interpretation of Supreme Court precedent is more plausible than the state court's; rather, the petitioner must demonstrate that Supreme Court precedent requires the

contrary outcome.

Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 888 (3rd Cir. 1999) referring to *O'Brien v. Dubois*, 143 F.3d 16, 24-25 (1st Cir. 1998). The appropriate standard for the "unreasonable application" clause is "whether the state court's application of Supreme Court precedent was objectively reasonable. The federal habeas court shall not grant the petition unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot be reasonable justified under existing Supreme Court precedent ... The primary significance of the phrase "as determined by the Supreme Court of the United States" is that federal courts may not grant habeas corpus relief based on the state court's failure to adhere to the precedent of a lower federal court on an issue that the Supreme Court has not

addressed. Thus in certain cases it may be appropriate to consider the decisions of inferior federal courts as helpful amplifications of Supreme Court precedent." *Matteo*, 171 F.3d at 889-890.

Section (e)(1) of the presumption of correctness provision which greatly heightens the degree of deference paid to a state court's findings of fact. The burden is on the Petitioner to rebut the presumption by clear and convincing evidence. 28 U.S.C. [Section] 2254(e)(1).

B. Factual background

The following facts have been extracted from the decision of the Superior Court of Pennsylvania, filed on October 15, 1999:

> In early July, 1997, Tina Marcario, the victim moved out of an apartment she had shared with [Petitioner]. Marcario and [Petitioner] had two children together. [Petitioner] had attempted to kill himself on several occasions and prior to the murder,

> he had repeatedly threatened to carry out his suicide. Just prior to the shooting, [Petitioner] obtained access to the murder weapon, A gun, which he had applied for a few weeks earlier. On August 21, 1997, [Petitioner] shot Marcario five times in the parking lot of a personal care facility following a verbal argument. On January 16, 1997, a jury convicted [Petitioner] of first degree murder.

(Doc. 21, Opinion of the Superior Court of Pennsylvania, filed October 15, 1999).

C. Analysis

The grounds raised by the Petitioner concern the effectiveness of trial counsel. In the opinion affirming the Court of Common Pleas of Luzerne County, the Pennsylvania Superior Court set forth the following standard:

> The threshold inquiry in effectiveness of counsel claims is whether the issue/argument/tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness is of arguable merit; for counsel cannot be found

ineffective for failing to assert a meritless claim. Once this threshold is met we apply the reasonable basis test is to determine whether counsel's chosen course was designed to effectuate his client's interests. If we conclude that the particular course chosen by counsel had some reasonable basis, our inquiry ceases and counsel's assistance is deemed effective. If we determine that there was no reasonable basis for counsel's chosen course then the accused must demonstrate that counsel's ineffectiveness worked to his prejudice. The burden of establishing counsel's ineffectiveness is on the [defendant] because counsel's stewardship of the trial is presumptively effective.

Commonwealth v. Wilson, 672 A.2d 293, 298 (Pa. 1996)(citation and quotation marks omitted), *cert. denied,* 519 U.S. 951 (1996). Prejudice in this context has been defined to mean appellant must establish that but for the ineffective act or omission there is a reaonable probability the result at trial would have differed. *Commonwealth v.* Crawley, 663 A.2d 676, 679 (Pa. 1995), *cert. denied,* 517 U.S. 1212 (1996). Where it is clear a defendant has failed to meet the prejudice prong, the claim may be disposed

> of on that basis alone, without a determination concerning the first two prongs. *Wilson, supra*. Counsel is deemed effective if any reasonable basis exists for his actions. *Commonwealth v. Douglas*, 645 A.2d 226, 231 (Pa. 1994).

(Doc 21, pp.2-3, Opinion of the Superior Court of Pennsylvania, filed October 15, 1999).

The controlling United States Supreme Court case on the issue of ineffective assistance of counsel is *Strickland v. Washington*, 466 U.S. 668, 687-688, 694 (1984). The *Strickland* Court determined that the proper standard for attorney performance is that of reasonably effective assistance. *Id.* at p. 687. Further, "[j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court,

examining counsel's defense after it has proved unsuccessful to conclude that a particular act or omission of counsel was unreaonable." *Id.* at 689 (citations omitted). Also, the defendant must show that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-688, 694 (1984). Clearly, the standard utilized by the state court is in accord with the standard set by the United States Supreme Court.

1. Ground One.

The first ground of ineffective assistance of counsel raised by Butry is that trial counsel was ineffective for failing to pursue a dimished capacity defense at trial. Butry argues the fact

that he was under the influence of Prozac and Valium at the time of the murder, in combination with the opinion that Dr. Sadoff provided trial counsel , that Butry was "out of control", required counsel to pursue a diminished capacity defense.

In discussing this issue, the Superior Court stated: "[w]ith respect to appellant's claim that counsel should have pursued a dimished capacity defense. we note counsel employed the defense of passion at trial, in an effort to reduce the crime to voluntary manslaughter. Given the uncontested fact appellant shot the victim, this was hardly a poor strategy, one supported by many of the same facts advocated in favor of diminished capacity." (Doc. 21, p.3, Opinion of the Superior Court of Pennsylvania, filed October 15, 1999). The Court further states:

> However, passion is inconsistent with diminished capacity. That is, had counsel

> argued diminished capacity to the jury, he would have cut the legs from under his credibility arguing a heat of passion defense. One cannot argue how appellant's mind was overcome with passion from the unfolding events, then argue with a straight face that appellant was, simultaneously, unable to intend the very consequences caused him to seek.
>
> Appellant states, "the thrust of this argument is that there was a factually supportable defense, which trial counsel failed to present to the jury." There is no requirement, however, that trial counsel present a factually supportable defense that undermines the credibility of another valid defense. The law doesn't require counsel to be automatons, presenting everything "factually supportable," regardless of the fact that this will cause the jury's total disbelief of everything. Accordingly, we conclude counsel had a reasonable basis to forego a diminished credibility defense.

(Doc. 21, pp. 3-4, Opinion of the Superior Court of Pennsylvania, filed October 15, 1999). While the diminished capacity defense may have been available to counsel, the Butry

has failed to present evidence that would lead this court to conclude that the state court conclusion resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. Nor has he established that the proceedings resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Consequently, the petition will be denied as to the claim involving ineffective assistance of counsel on the issue of failure to present a diminished capacity defense.

2. Ground 2.

The second ground involves counsel's failure to present evidence that Butry had access to other firearms in August of 1997. He argues that "[a] material part of the

government's case against Mr. Butry was that Mr. Butry was running wild, desperately trying to get a firearm for several days before the offense conduct. This evidence supported the government's claim that the shooting had been premeditated." (Doc. 2, p.8). It is argued that "[t]rial counsel failed to investigate, present any evidence to the jury or develop this issue in any manner" and that evidence that Mr. Butry had ready access to other firearms would have materially undermined the government's theory of the case. (Doc. 1, p.5).

In considering the issue, the Superior Court summarily stated that "[l]ikewise, appellant's claim that counsel should have presented evidence that appellant had access to other firearms in August 1997, lacks merit; such testimony was presented. N.T., 1/16/98, at 862-864." (Doc. 21, pp. 3-4, Opinion of the

Superior Court of Pennsylvania, filed October 15, 1999). He portions of the testimony relied upon by the Superior Court are attached as Exhibit C to Butry's brief in support of his habeas petition. (Doc. 2, Exhibit C). Butry argues that the testimony relied upon by the Superior Court was not presented by trial counsel but, rather, through the government's twenty-second witness, Steve Fogle. This argument does not change the fact that testimony concerning Butry's access to a firearm and his attempt to gain access to a firearm was indeed presented to the jury. Moreover, also attached to Butry's supporting brief as Exhibit A is additional trial testimony which indicates that Butry's access to access to firearms was presented to the jury. (Doc. 2, Exhibit A, N.T., at 970). Therein, Butry testified about his possession of a shotgun and another firearm which he used for target

practice prior to selling it. (Doc. 2, Exhibit A).

Butry has failed to establish that the state court conclusions regarding his ineffectiveness claim relating to Butry's access to other firearms resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. Nor had he established that the proceedings resulted in a decision that was based on a reasonable determination of the facts in light of the evidence presented in the state court proceedings. Therefore, the petition will be denied as to this claim.

III. Conclusion

An appropriate order will issue denying the petition for writ of habeas corpus on the merits

Filed: May 13, 2003

(3)

No. 04-53 MAY 8 2004

IN THE SUPREME COURT OF THE UNITED STATES

HARRY BUTRY, JR.,

Petitioner

vs.

SUPERINTENDANT SCI-COAL TOWNSHIP, Superintendant at SCI-Coal Township; LUZERNE COUNTY, District Attorney, ATTORNEY GENERAL,

Respondents

On Petition for Writ of Certiorari To The U. S. Court of Appeals for the Third Circuit

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APPENDIX - VOLUME 2

Michael C. Kostelaba, Esquire
Counsel of Record
P.O. Box 1321
Wilkes-Barre, Pa. 18703
(570)-823-1778

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IN THE SUPREME COURT OF

PENNSYLVANIA

MIDDLE DISTRICT

COMMONWEALTH : No. 036 M.D.

OF PENNSYLVANIA : Allocatur Docket

: 2000

v. :

:

HARRY BUTRY, JR., :

Petitioner :

ORDER

PER CURIAM:

AND NOW, this 18th day of May 2000, the petition for allowance of appeal is denied.

IN THE SUPERIOR COURT OF

PENNSYLVANIA

COMMONWEALTH :

OF PENNSYLVANIA :

:

v. :

:

HARRY BUTRY, JR., : No. 1305 Harrisburg

APPELLANT : 1998

ORDER OF COURT

The Court hereby DENIES the application filed October 29, 1999 requesting reargument or reconsideration of the decision dated October 15, 1999.

PER CURIAM

DATE: December 20, 1999

IN THE SUPERIOR COURT OF

PENNSYLVANIA

COMMONWEALTH :

OF PENNSYLVANIA :

:

v. :

:

HARRY BUTRY, JR., : No. 1305 Harrisburg

APPELLANT : 1998

Appeal from the Judgment of Sentence entered on March 20, 1998, in the Court of Common Pleas of Luzerne County, Criminal No. 2981 of 1997

BEFORE: EAKIN, JOYCE and HESTER, JJ

MEMORANDUM:

Harry Butry, Jr. appeals from the judgment of sentence of life imprisonment imposed following his conviction of first degree murder, We affirm.

In early July, 1997, Tina Marcario, the

victim, moved out of an apartment she had shared with appellant. Marcario and appellant had two children together. Appellant had attempted to kill himself on several occasions and prior to the murder, he had repeatedly threatened to carry out his suicide. Just prior to the shooting, appellant obtained access to the murder weapon, a gun, which he had applied for a few weeks earlier. On August 21, 1997, appellant shot Marcario five times in a parking lot of a personal care facility following a verbal argument. On January 16, 1998, a jury convicted appellant appellant of first degree murder. Following the imposition of sentence and the denial of his post-sentence motions, appellant filed this timely appeal. Appellant raises the following issues: 1) whether trial counsel was ineffective for failing to properly investigate, prepare and present a diminished capacity defense; 2)

whether trial counsel was ineffective for failing to present evidence of appellant's suicidal tendencies; 3) whether trial counsel was ineffective for failing to present evidence appellant had access to other firearms in August 1997; 4) whether trial counsel was ineffective for failing to move for a mistrial due to interaction between a juror and the victim's sister; and 5) whether the trial court abused its discretion by denying appellant's motion for a mistrial based on a juror's observation of him in custody during trial, absent a *voir dire* examination of the juror.

Appellant's first four issues challenge trial counsel's effectiveness.

> The threshold inquiry in effectiveness of counsel claims is whether the issue/argument/tactic which counsel has foregone and which forms the basis for the assertion of ineffectiveness if of arguable merit; for counsel cannot be found ineffective for failing to assert a meritless claim. Once this threshold is met

> we apply the reasonable basis test to determine whether counsel's chosen course was designed to effectuate his client's interests. If we conclude that the particular course chosen by counsel had some reasonable basis, our inquiry ceases and counsel's assistance is deemed effective. If we determine that there was no reasonable basis for counsel's chosen course then the accused must demonstrate that counsel's ineffectiveness worked to his prejudice. The burden of establishing counsel's ineffectiveness is on the [defendant] because counsel's stewardship of the trial is presumptively effective.

Commonwealth v. Wilson, 672 A.2d 293, 298 (Pa. 1996)(citation and quotation marks omitted), cert. denied, 519 U.S. 951 (1996). Prejudice is this context has been defined to mean appellant must establish that but for the arguably ineffective act or omission there is a reasonable probability the result at trial would have differed. **Commonwealth v. Crawley**, 663 A.2d 676, 679 (Pa. 1995), cert. denied, 517 U.S. 1212(1996). Where it is clear a

defendant has failed to meet the prejudice prong, the claim may be disposed on that basis alone, without a determination concerning the first two prongs. **Wilson, supra**. Counsel is deemed effective if any reasonable basis for his exists for his actions. **Commonwealth v. Douglas**, 645 A.2d 226, 231 (Pa. 1994).

With respect to appellant's claim that counsel should have presented a diminished capacity defense, we note counsel employed the defense of heat of passion at trial, in an effort to reduce the crime to voluntary manslaughter. Given the uncontested fact appellant shot the victim, this was hardly a poor strategy, one supported by many of the same facts advocated in favor of diminished capacity.

However, passion is inconsistent with diminished capacity to the jury, he would have cut the legs from under his credibility arguing

a heat of passion defense. One cannot argue how appellant's mind was overcome with passion from the unfolding events, then argue with a straight face that appellant was, simultaneously, unable to intend the very consequences passion caused him to seek.

Appellant states "the thrust of this argument is that there was a factually supportable defense, which trial counsel failed to present to the jury." There is no requirement, however, that counsel present a factually supportable defense that undermines the validity of another valid defense. The law does not require counsel to be automatons, presenting everything "factually supportable," regardless of the fact this will cause the jury's total disbelief of everything. Accordingly, we conclude counsel had a reasonable basis to forego a diminished capacity defense.

Next, appellant argues counsel was

ineffective for failing to present evidence of his suicidal tendencies. Despite this contention, the record is replete with references to appellant's suicide attempts and suicidal inclinations. N.T., 1/16/98, at 590, 610, 617, 624, and 850. Appellant himself testified concerning his suicide attempts. N.T. 1/16/98, at 951. Therefore, appellant's claim is meritless.

Likewise, appellant's claim that counsel should have presented evidence that appellant had access to other firearms in August, 1997, lacks merit; such testimony was presented. N.T., 1/16/98, at 862-64.

Appellant further contends trial counsel should have moved for a mistrial due to the interaction between a juror and the victim's sister. However, there is nothing of record referencing this alleged interaction. We cannot consider matters not of record.

Commonwealth v. Bracalielly, 658 A.2d 755, 763 (Pa. 1995).

Finally, appellant argues the trial court abused its discretion in denying his motion for a mistrial where a juror observed him in custody during trial. Primarily, appellant alleges the juror saw him in prison garb while waiting for an elevator. The trial court did not *voir dire* the juror. In a similar case, this Court found:

> As a general rule, defendants should not be subjected to physical restraint while in court unless the trial judge has found such restraint necessary to maintain order. Nevertheless, it is clear that a brief, accidental sighting of a defendant in custodial trappings, without more, is not so inherently prejudicial as to significantly impair the presumption of innocence to which a defendant is entitled ... The court concluded that under these circumstances, a brief sighting of the defendant in handcuffs was not grounds for a mistrial.

Commonwealth v. Johnson, 500 A.2d 173,

175 (Pa.Super. 1985)(citations and quotation marks omitted). Therefore, the trial court properly determined the juror's observation was not grounds for a mistrial.

Having determined appellant is not entitled to relief on the claims presented, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Dated: October 15, 1999

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HARRY BUTRY,	:	CIVIL ACTION
Petitioner	:	No. 3:CV-01-0834
	:	
v.	:	(Judge Munley)
	:	
SUPERINTENDANT,	:	
SCI -COAL	:	
TOWNSHIP, et al.,	:	
Respondent	:	

ORDER

AND NOW, to wit, this 13th day of May, 2003, consistent with the foregoing Memorandum, **IT IS HEREBY ORDERED** that:

1. The Petition for Writ of Habeas Corpus is DENIED;

2. The Clerk of Courts is directed to CLOSE this case.

3. There is no basis for the issuance of a Certificate of Appealability.

BY THE COURT:

s/James M. Munley

JUDGE JAMES M. MUNLEY

United States District Court

Filed: May 13, 2003